IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

BROWN LAND & ROYALTY CO., INC.
Petitioner

vs.

HATTIE C. PICKETT, ET ALS
Defendants

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

To the Honorable the Supreme Court of the United States:

OPINIONS BELOW

The opinion rendered in the District Court below, in which is incorporated the judgment of that Court, has not and will not be officially reported. The decision of the Supreme Court of Louisiana is reported in 75 So. 2d, 19 (Advance sheets of November 18, 1954), and copies of both opinions are annexted hereto pursuant to the provisions of Rule 23 of the Rules of this Court.

JURISDICTION AND STATEMENT OF THE GROUNDS FOR THE APPLICATION

The grounds for invoking the jurisdiction of this Court are that the Supreme Court of Louisiana has failed to accord to a judgment of the United States District Court for the Eastern District of Louisiana the effect and interpretation accorded to it by the jurisprudence of the Federal Courts and particularly by the jurisprudence established by this Court, and this action of said Court has deprived your petitioner of the right to be heard and offer evidence, thereby denying it due process of law. The decision of the Supreme Court of Louisiana herein sought to be reviewed was rendered on July 2, 1954 (Record pp 295-299, Inclusive). A rehearing was timely applied for and the Supreme Court of Louisiana made its action final by denying the petition for a rehearing on October 5, 1954 (Record p 303). That Paragraph 3 of Section 1257 of Title 28 of the U.S.C.A. and numerous decisions of this Court confers jurisdiction on Your Honors in this case.

QUESTIONS PRESENTED

The question presented in this case is whether the Supreme Court of a state can accord to a Federal Court judgment a scope and effect different from and beyond that accorded it by the jurisprudence as established by this Court, and in so doing deprive a litigant of the right to offer evidence in support of his demand.

Specifically in a suit to establish responsibility arising out of unconditional acceptance by children of the

succession of their parent who had made a mineral deed to plaintiff, can estoppel by judgment be applied because, in a former suit between the same parties a motion to dismiss, based upon two recorded instruments, not alleged upon in the instant suit, was maintained, no consideration of any kind having been given to the mineral deed?

OPINIONS INVOLVED IN THE DISPOSITION OF THIS APPLICATION

The disposition of this case involves not only the opinions rendered by the Louisiana Supreme Court and the Louisiana District Court but also the scope of the Federal Court judgment and the interpretation to be accorded it. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 198 Fed. 2d 74, and a copy of the opinion is annexed hereto.

STATEMENT OF THE CASE

On February 24, 1950, the defendants in this cause, other than The Texas Company, instituted a suit against the present petitioner in the 18th Judicial District Court of the State of Louisiana (Record pp 44-49, Inclusive), which suit was removed by present petitioner to the United States District Court for the Eastern District of Louisiana (Record pp 33-35, Inclusive) where petitioner answered asserting title in itself to the property involved, relying upon a mineral deed executed by Mrs. Marie M. Clark and two written instruments executed by the present defendants (Record pp 21-29, Inclusive). A motion to dismiss present petitioner's claim was granted by the District

Judge for the Eastern District of Louisiana and his action was affirmed by the United States Court of Appeals for the Fifth Circuit (Record pp 4-8, Inclusive).

On February 20, 1953, present petitioner instituted this suit against the same parties claiming the title to the same property but on the ground that the defendant Clark heirs had accepted their mother's succession and become bound by her warranty, which claim had not been pleaded in the Federal Court suit (Record pp 4-10, Inclusive), the fact of such acceptance not being known to petitioner at that time (Record pp 160-170, Inclusive). The Louisiana District Judge sustained exceptions of res adjudicata and no cause or right of action. (Record pp 255-288, Inclusive). The Supreme Court of Louisiana affirmed the action of the District Judge insofar as the exception of res adjudicata is concerned. (Record pp 295-299, Inclusive).

THE METHOD AND STAGE OF THE PROCEEDINGS IN WHICH THE FEDERAL QUESTION WAS FIRST RAISED AND THE DISPOSITION BY THE STATE COURT

The present peitioner raised the question of the effect to be accorded the Federal Court judgment in its original petition in the Louisiana District Court by pointing out that the matters pleaded and argued in the Federal Court proceedings were entirely different from the facts pleaded and relied upon in the present proceedings (Record pp 4-11, Inclusive), and in their first appearance in the Louisiana District Court the present defendants

pleaded the Federal Court judgment was res adjudicata of the issues involved in the present suit (Record pp 174-176 and pp 178-179, Inclusive).

REASONS FOR GRANTING THE WRIT

The pleadings in this case, which for the purposes of the exception of res adjudicata, are deemed to be true, show that present petitioner contended in the Federal Court proceeding that title passed to its ancestor, Mrs. Marie Clark, by virtue of two written instruments executed by the defendant Clark heirs and appearing on the public records. It was not pleaded that the children of Mrs. Marie Clark had become bound by her warranty because of their acceptance of her succession (Record pp 4-10, Inclusive) and the Federal Court did not adjudicate upon that point, (Record pp 148-154, Inclusive). The pleadings also show that long after the rendition of the Federal Court judgment that they discovered that an acceptance of Mrs. Clark's succession had occurred. (Record pp 166-170, Inclusive). This suit was then instituted based upon that ground.

This Court has always held that a Federal Court judgment is res adjudicata only as to matters actually pleaded and adjudicated and that matters which might have been but were not pleaded do not constitute a bar to a subsequent action. This Court announced this rule as far back as 1821 during the tenure of Chief Justice Marshall, in *Hopkins vs. Lee*, *6* Wheaton, 108. There are a number of subsequent decisions to the same effect, par-

ticularly *Russell vs. Place*, 94 U.S. 606, and *Stark vs. Starr*, 94 U.S. 477, *Wiggins Ferry Co. vs. Ohio & M.R.R. Co.*, 142 U.S. 396. The two latest decisions we have been able to find which support this proposition are *United States vs. International Building Co.*, 345 U.S. 502, and *Partmar Corporation vs. Paramount Pictures Theatre Corporation*, 347 U.S. 89. In view of these authorities we take it to be settled law that a Federal Court judgment is not conclusive as to any matters except those specifically pleaded and passed upon. This Court has held that the judicial proceedings of the Federal Courts are to be accorded the same full faith and credit as is required to be accorded judicial proceedings of another state. *Stoll vs. Gottlieb*, 305 U.S. 165. And of course the judgment of a state of the union sought to be enforced in another state is accorded the effect given it by the state of its rendition. This is settled by numerous authorities and we cite *Magnolia Petroleum Company vs. Hunt*, 320 U.S. 430. The Supreme Court of Louisiana fell into error in this case because it accorded to the Federal Court judgment the same effect it would have had, had it been rendered by a Louisiana State Court. Even in giving it that effect the Supreme Court of Louisiana erred because present petitioner had no knowledge of the acceptance of the Clark succession at the time the Federal Court proceeding was being carried on (Record pp 166-170, Inclusive), but in any event in this case the Federal Court judgment was binding and conclusive only as to the matters adjudicated, namely whether the two written instruments involved there conveyed a title to Mrs. Marie Clark. Since the question of the acceptance of the Clark succession was not

before the Federal Court, under the jurisprudence as announced by Your Honors it was not conclusive on that point and cannot be the basis for sustaining an exception of res adjudicata.

The question presented is a substantial one in view of the fact that the erroneous construction given the Federal Court judgment by the Louisiana Supreme Court has denied present petitioner his day in Court in that he is not permitted to prove his case by the introduction of testimony. Since one of the fundamentals of due process of law is the opportunity to offer evidence and to be heard, we submit that the question involved not only presents a Federal question but also is substantial because petitioner's constitutional rights have been invaded.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition should be granted.

Brown Land & Royalty Company, Inc.

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APPENDIX A

FRIDAY JULY 2 1954

No. 41,513

SUPREME COURT OF LOUISIANA

BROWN LAND AND ROYALTY COMPANY, INC.

V.

HATTIE C. PICKETT, ET AL

Appeal from the Eighteenth Judicial District
Parish of Pointe Coupee

Honorable C. Iris Dupont, Judge

FOURNET, Chief Justice.

The plaintiff, Brown Land and Royalty Company, Inc., having lost in the federal courts [1] the converted petitory action wherein it sought to be decreed the owner of half of all the oil, gas, and other minerals in and under some 272 acres of land in Pointe Coupee Parish, [2] instituted this petitory action against the same parties involved

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1. Brown Land and Royalty Co., Inc. v. Green, et al., 198 F. ed 74; certiorari denied by the United States Supreme Court, 73 S. Ct. 335; 344 US 913.

2. The land is described as the N/2 of the NW/4 of Section 28, the SW/4 of Section 21, and that part of the SE/4 of Section 31 south of the land of Mrs. Rose Duckworth, all in T. 6 S., R. 8 W.

in the federal suit [3] again seeking recognition as the owner of this identical mineral interest. It prosecutes this appeal from a judgment of the lower Court dismissing its suit on a plea of res judicata and exceptions of no cause and no right of action.

Counsel for appellant contends the plea of res judicata was improperly sustained by the trial judge since the first suit was predicated on the assertion that two instruments [4] executed by the Clark children were sufficient to either create in their mother title to the half of the minerals she subsequently conveyed to Clifford Brown, plaintiff's ancestor in title, and estop the Clark children from denying they had, whereas the instant suit is predicated upon the contention that Mrs. Clark's deed to Brown is valid against these heirs since they have tacitly accepted the succession of their mother and are, therefore, bound in law on the warranty contained in her deed to Brown in law on the warranty contained in her deed to Brown that she was the owner of the minerals therein conveyed. This contention is bolstered by the argument that at the time of the institution of the original suit appellant was

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3. These are the children and heirs of Calvin E. Clark, who in his separate name formerly owned the property affected by the mineral interest in controversy — Hattie C. Pickett, Frances Clark Green, Florena Clark Thomas, Agnes Clark Worsham, and Toral E. and Samuel H. Clark — and their mineral lessee, The Texas Company.

4. One instrument is a 1922 act executed by the Clark children granting their mother the usufruct of the property inherited from their father, and the other is a 1944 declaration of interests executed for the guidance of a mineral lessee in distributing royalty payment among the interested parties.

not aware of the tacit acceptance of Mrs. Clark's succession by her children, reliance being placed on the statement in Gajan v. Patout & Burguieres, 135 La. 156, 65 So. 17, to the effect that a party litigant is required to urge in a suit only the "title or defense (that) may be at his command *or within his knowledge.*" (Emphasis and bracket supplied.)

Under the civil law as codified in our state, unlike the doctrine of the common law courts that hold res judicata includes not only everything pleaded in a cause but everything that might have been pleaded, "The authority of the thing adjudged takes place *only* with respect to that which was the object of the judgment. The thing demanded must be the same; the demand must be found on the same cause of action, the demand must be made between the same parties, and formed by them against each other in the quality." Article 2286 of the Revised Civil Code. (Emphasis supplied.)

But, like most rules, this is not without exception, and while there is confusion in our jurisprudence over the necessity for all-inclusive pleading in a given cause, due in large measure to reliance on expressions contained in common law authorities, there is no confusion with respect to the application of the law with respect to the plea of res judicata in petitory actions, for our jurisprudence uniformly requires that parties litigant in a petitory action, whether plaintiff or defendant, set up whatever title or defense they may have or a judgment thereon will bar a second suit based on a right or claim which

existed at the time of the first suit, even though omitted therefrom. *Shaffer v. Scuddy*, 14 La. Ann. 575; *Heirs of Brigot v. Brigot*, 49 La. Ann. 1428, 22 So. 641; *Howcott v. Pettit*, 106 La. 530, 31 So. 61; *Lindquist v. Maurepas Land & Lumber Co.*, 112 La. 1030, 36 So. 843; *Gajan v. Patout & Burguieres*, 135 La. 65 So. 17; *Succession of Whitner*, 165 La. 769, 116 So. 180; *Hope v. Madison*, 194 La. 337, 193 So. 666; *Himel v. Connely*, 195 La. 769, 197 So. 424; and *Quarles v. Lewis*, No. 42,731 on the docket of this Court, being handed down this day. See, also, the discussion of this subject at 2 Louisiana Law Review 491.

This exception is, of course, predicated on the necessity of insuring that there be some measure of stability in titles to realty, and also to prevent undue hardship and/or fraud with respect to the rights of innocent third parties purchasing real rights on the strength of judicial pronouncements relative thereto, as well as to obviate a muplicity of suits.

An examination of the case of Gajan v. Patout & Burguieres, supra, reveals the underscored portion of the statement therefrom relied on by the appellant, as above pointed out, is dicta. However, even conceding it was not, the record in the instant case discloses that at the time the former suit was instituted in March of 1950, the succession of Mrs. Clark had been judicially opened, [5] that

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5. The pleadings in the succession matter, which form a part of this record, disclose Mrs. Clark's succession was accepted by her children, but with benefit of inventory. The appellant alleged these proceedings were a simulation had a sham and instituted by the heirs of Mrs. Clark to prevent appellant from holding them under her warranty, since appellant believed they had, long prior thereto, **tacitly** accepted her succession and distributed among themselves the proceeds thereof.

counsel for appellant was aware of that fact, and had, following full disclosure of requisite information upon which this issue could or should have been based during a conference with opposing counsel shortly after the institution of the suit, instigated a token investigation of the matter for the purpose of ascertaining whether Mrs. Clark's children had in fact tacitly accepted her succession, although he made no attempt by supplemental petition to present this issue squarely to the court; further, although it is alleged in the petition in the instant case appellant did not actually know until January of 1953 that Mrs. Clark's children had accepted her succession, in both the Circuit Court of Appeal for the Fifth Circuit of the United States, as well as in the United States Supreme Court, appellant, as early as the middle of 1952, urgently sought to have the case remanded for trial on the merits in order that it might discover through cross examination whether there had been such as acceptance. This clearly demonstrates counsel had knowledge of or at his command the cause of action upon which the present suit is grounded.

Inasmuch as an affirmance of the lower Court's judgment on the plea of res judicata renders it unnecessary to consider the exceptions of no cause and no right of action, and is also conclusive of the arguments advanced for the cancellation of the mineral lease held by The Texas Company, it will be needless for us to discuss these issues.

For the reason assigned, the judgment appealed from is affirmed, at the cost of the appellant.

APPENDIX B

18TH. JUDICIAL DISTRICT COURT
PARISH OF PONTE COUPEE
STATE OF LOUISIANA

BROWN LAND AND ROYALTY COMPANY, INC.

VS. NO. 4144

HATTIE C. PICKETT, ET AL

Written Opinion And Decision Of The District Court On The Exception And Plea Of Res Judicata And Exceptions Of No Right And Cause Of Action:

The present proceeding is the second petitory action instituted by the same Brown Land and Royalty Company, Inc., as plaintiff against the same defendants, Hattie C. Pickett, Toral E. Clark, Samuel H. Clark, Frances Clark Green, Florena Clark Thomas, Agnes Clark Worsham, and The Texas Company, asserting and claiming title to the same mineral interest in the same property. Defendants have opposed this proceeding by exceptions of res judicata and no right and no cause of action.

The pertinent facts are as follows: -

On February 25, 1950 Frances Clark Green, Agnes Clark Worsham, Florena Clark Thomas, Hattie C. Pickett, Toral E. Clark and Samuel H. Clark instituted an action in jactitation or slander of title against Clifford H. Brown and Brown Land and Royalty Co., Inc., bearing Number 3645 of

the docket of this Court. Plaintiffs claimed that the defendants were slandering the title of certain property which they, petitioners, are the actual owners of by inheritance from their deceased father Calvin E. Clark and are and have been in the actual physical possession of for many years, which said property is situated in the Parish of Pointe Coupee, State of Louisiana, and is described as follows: -

> "272 acres, more or less, in sections 21 & 28 of Township Six (6) South, Range Eight (8) East being the North One-Half (N½) of the (NW¼) of section 28, also the (SW¼) of section 21, and also that part of the (SE¼) of secion 21 South of the land of Mrs. Rose Duckworth."

In article 6 of the petition in said suit 3645, it is alleged: - "That the said Clifford H. Brown and Brown Land and Royalty Co., Inc., (hereinafter referred to as defendants) are slandering the title of your petitioners to said property by claiming a portion of the mineral rights therein and thereunder pursuant to the following invalid instruments which they have caused to be recorded in the Conveyance Records of Pointe Coupee Parish, Louisiana: -

> (a) A purported sale of one-half (½) of the mineral rights from Marie M. Clark to Clifford H. Brown recorded in Conveyance Book 20, Entry 297, records of Pointe Coupee Parish, Louisiana.
>
> (b) A purported conveyance of one-fourth (¼) of said minerals by the said Clifford

H. Brown to David L. Richardson recorded in Conveyance Book 20, Entry 353, records of Pointe Coupee Parish, Louisiana.

(c) A purported conveyance of one-fourth (¼) of said minerals from the said David L. Richardson to Mammouth Corporation, act recorded in Conveyance Book 21, Entry 436, records of Pointe Coupee Parish, Louisiana.

And the prayer of said petition *in part* reads as follows: ".....; *that defendants be ordered to disclaim any title whatsoever to said property and to said mineral rights or to assert within a delay* to be fixed by this Honorable Court *such rights as they, or either of them, may have or claim to have against the same and that in default of the successful assertion of such rights within the delay as aforesaid, that there be judgment herein forever barring defendants from setting up any claims, rights or privileges to or against the property, and mineral rights therein or thereunder described in this petition,* and directing the Clerk of Court for the Parish of Pointe Coupee to erase from the Conveyance Records of said Parish the instruments described in this petition so far as they attempt to bear upon and affect the property hereinbefore described."

On March 6, 1950 the said Clifford H. Brown and the said Brown Land and Royalty Company filed a petition addressed to the "*Honorable Judges of the United States District Court for the Eastern District of Louisiana, Baton Rouge Division,*" *and obtained and effected the removal of said suit No. 3465 from the 18th. Judicial District Court in and for the Parish of Pointe Coupee to the said United States District Court.*

On March 27, 1950 the "answer of Clifford H. Brown to complaint" was filed, wherein he denied all and singular the allegations of plaintiffs' complaint being numbered one through nine, inclusive for want of sufficient information to justify a belief therein. Brown disclaimed any title to the property described in plaintiffs' complaint and asserted that said property is owned by defendant Brown Land and Royalty Company, Inc. He also prayed that the complaint be dismissed and that he be relieved from further appearing or answering.

On March 27, 1950 there was filed the "answer of Brown Land and Royalty Company, Inc. to complaint", wherein said defendant denied that plaintiffs are the owners of said property and further denied that plaintiffs had been in the actual physical possession of said property for a period of one year preceding the filing of said suit. And in said answer *said defendant*, with reservation of all its rights on its denial of plaintiffs' possession, *converted this action of slander of title into a petitory action expressly assuming the position of and becoming* the plaintiff in a petitory action involving said property, admitting articles 2 to 9 inclusive of the said slander of title suit, denying that it is slandering the title of the plaintiffs in said action in jactitation and defendants in the converted petitory action, but admitting the execution and recordation of the instruments designed and shown in article 6 of slander of title suit as subparagraphs a, b and c, - and by further answering set forth its position as plaintiff in the converted petitory action. And from its said answer to complaint, the position of Brown Land and Royalty Company, Inc., as a plaintiff in the converted petitory action, by its pleadings, is as follows: -

1. That the property involved in this case was acquired *as his separate property* and prior to his marriage by Calvin E. Clark, the father of the Plaintiffs in said suit for slander of title, by acts recorded in Conveyance Book 4, Entry Number 15115, Conveyance Book 9, Entry 19190 and under Entry Number 9055 of the records of 1871, all of the Parish of Pointe Coupee, Louisiana. (Note article 3 of jactitation suit was admitted by Brown Land and Royalty Company, Inc).

2. *That Calvin E. Clark died on September 26, 1922* leaving his widow Mrs. Marie M. Clark and his children and sole heirs (plaintiffs in slander of title suit and defendant in converted petitory action); that his said children acquired all of their said father's property by inheritance including the property involved in this case; and that as shown by certified copy of act executed before Andrew C. Noble, Notary Public, *on September 30, 1922*, duly recorded under Entry No. 6298 of Conveyance Book D and Entry No. 127 of Mortgage Book 29 of the Records of Pointe Coupee Parish, and annexed to said answer, the said children and sole heirs of Calvin E. Clark, deceased, namely, Mrs. Agnes Worsham, Mrs. Frances Green, Mrs. Mattie Pickett, Miss Florena Clark, Toral E. Clark and Samuel H. Clark, made a grant and donation to their mother Mrs. Marie M. Clark, reading in part as follows: -

"Appearers further declare that they do hereby grant, give and bequeath unto their moth-

er, Mrs. Marie M. Clark, widow of their deceased father, Calvin E. Clark, all their interest in and to their father's property, both real and personal *for her use during the rest of her natural life.*"

Appearers further declared that they do empower and instruct their mother, Mrs. Marie M. Clark, to collect all accounts due said estate, to pay any and all indebtedness outstanding against same, and whatever balance may be on hand after liquidating said indebtedness, to be used by her as she may deem best for her needs and *during remainder of her natural life*, leaving the property without a will at her death.

3. That on November 25, 1947, Mrs. Marie M. Clark conveyed unto Clifford H. Brown an undivided on-half of all the oil, gas, and other minerals in and under and that may be produced from the property described in Article 1 of the complaint filed by defendants in converted action by an act duly recorded, marked P1 for identification, which reads in part as follows: -

> "*The herein grantor is conveying her part of the community estate mineral interest in the above described* 272 acres of land, more or less."

4. That on October 9, 1944, Mrs. Marie M. Clark, the said Clark Heirs, G. L. Paret and The Texas Company entered into a contract and agreement whereby The Texas Company was authorized and directed to pay

certain specific fractional parts of payments to be made under the lease assigned to The Texas Company.

5. That by successive transactions the purported oil, gas and mineral interest alleged to have been acquired by Clifford H. Brown from Mrs. Marie M. Clark on November 25, 1949, was transferred to Brown Land and Royalty Company, Inc.

6. That the Clark Heirs and The Texas Company are now estopped to deny the title of Brown Land and Royalty Company, Inc., by reason of the execution and recordation of the instruments aforesaid and receipt of lease money and lease rentals and by representations of Mrs. Frances Clark Green, which estoppel Brown Land and Royalty Company, Inc., especially pleads.

And the prayer of said answer of Brown Land and Royalty Company, Inc., filed, as aforesaid, on March 27, 1950, reads in part as follows: -

"Defendant prays that this Court decree that the requisite corporeal possession necessary to maintain this proceeding does not exist in plaintiffs, dismissing this suit at complainant's cost."

"In the alternative and in the event this Court be of the opinion that the requisite possession exists in complainants, defendant prays that after due proceedings had, there be a judgment in its favor and against the complainants recognizing defendant (plain-

tiff in converted action) as the true and lawful owner of an undivided one-half of all the oil, gas and other minerals in and under the hereinabove described property, and, as such, entitled to the full and undisturbed possession thereof."

"Defendant further prays that The Texas Company be ordered to account to your defendant for one-half of all of the oil, gas, and other minerals produced from the hereinabove described property from and after November 25, 1947."

"Still further in the alternative, and in the event this Court be of the opinion that Mrs. Marie M. Clark did not acquire a fee title to the property above described by virtue of the instrument dated September 30, 1922, that, in such event, *the plea of estoppel* hereinabove alleged be sustained and that defendant have judgment as hereinabove prayed for."

On March 29, 1950 on motion of Brown Land and Royalty Company, Inc., an order was issued making The Texas Company a party defendant to the counterclaim filed herein by Brown Land and Royalty Company, Inc.

On April 25, 1950 motion filed by The Texas Company to dismiss the counterclaim filed by Brown Land and Royalty Company, Inc. on the ground that the counterclaim fails to state a claim against The Texas Company upon which relief can be granted.

On May 3, 1950 amended answer and counterclaim of Brown Land and Royalty Company, Inc., was filed to amend its answer and counterclaim by adding thereto articles numbered 24 to 26, the recitals of which are substantially as follows:

> 24. That Mrs. Marie M. Clark resided on the said property involved herein and administered same following the execution of the said instrument of donation by the Clark Heirs to their said mother on September 30, 1922 *up to the date of her death more than 20 years thereafter*, etc. (Note: *This shows that Brown Land and Royalty Company, Inc. were aware of Mrs. Marie M. Clark's death prior to the filing of this pleading on May 3, 1950.)*
>
> 25. That Brown Land and Royalty Company, Inc. *relied upon those instruments described in articles 12 and 17* of the original answer and counterclaim, which instruments are (1) the said notarial act wherein the Clark Heirs made a grant and donation to their mother Mrs. Marie M. Clark, declaring therein "that they do hereby grant, give and bequeath unto their mother, Mrs. Marie M. Clark, widow of their deceased father, Calvin E. Clark, all their interest in and to their father's property, both real and personal, *for her use during the rest of her natural life*"; and (2) *the contract and agreement* entered into on October 9, 1944 between Mrs. Marie M. Clark, the said Clark Heirs, G. L. Paret and The Texas Company whereby The Texas Company was authorized and directed to pay certain specific fractional

parts of payments to be made under lease assigned to The Texas Company; that Brown Land and Royalty Company, Inc. "expended its funds *in reliance thereon* and is, consequently, entitled to all rights accorded a bona fide purchaser for value, relying upon the public records under the law of the State of Louisiana."

26. That Brown Land and Royalty Company, Inc. *relied upon the representations contained in the said instruments described in Articles 12 and 17 of its original answer* (said instruments being mentioned and described in article 25 immediately above) *and the representations alleged in article 19 of said original answer* obviously referring to (1) the allegation therein that Mrs. Marie M. Clark advised Dave Richardson that she owned one-half the minerals and would sell same if her children had no objection, and to (2) the allegation therein that Mrs. Frances Clark Green refused to sell any minerals owned by her and stated that her mother (Marie M. Clark) owned one-half of said minerals and she could do with it as she chose; and that Brown Land and Royalty Company, Inc. "expended its funds in reliance thereon and that, accordingly, each of the original complainants and The Texas Company are now estopped to deny your petitioner title to one half of the oil, gas and other minerals in and under the property described in Article 1 of the original complaint, *which estoppel* your defendant now specially *pleads.*"

And the prayer of said supplemental and amended answer and counterclaim filed on May 3, 1950 reads as follows: "Wherefore premises considered, defendant (plaintiff in converted action and counterclaim) prays for judgment in its favor as set forth in its original answer and counterclaim."

On May 3, 1950 original plaintiffs, Frances Clark Green, Agnes Clark Worsham, Florena Clark Thomas, Hattie C. Pickett, Toral E. Clark and Samuel H. Clark, (defendants to counterclaim and converted petitory action), filed a motion to dismiss the counterclaim filed by Brown Land and Royalty Company, Inc. "because the said counterclaim fails to state a claim against movers upon which relief can be granted."

On May 22, 1950 original plaintiffs, Frances Clark Green, Agnes Clark Worsham, Florena Clark Thomas, Hattie C. Pickett, Toral E. Clark and Samuel H. Clark, (defendants to counterclaim and converted petitory action), filed a motion to dismiss the counterclaim and amended counterclaim filed by Brown Land and Royalty Company, Inc. "because the said counterclaim as amended fails to state a claim against movers upon which relief can be granted."

On May 31, 1950 defendant The Texas Compay, filed a motion to dismiss the counterclaim and amended counterclaim of Brown Land and Royalty Company, Inc. "because the said counterclaim, as amended, fails to state a claim against mover upon which relief can be granted."

On August 29, 1950 "Stipulation of Counsel" was filed as follows: -

> "In the above entitled and numbered case it is agreed by and between counsel that although Article 1 of plaintiff's petition alleging corporeal possession of the property involved in this suit was denied by defendant, Brown Land and Royalty Company, Inc., in in its answer, that in truth and in fact the plaintiffs have had corporeal possession of said property for more than one year preceding the filing of this suit."
>
> "That the defendant's denial of said corporeal possession was based upon the erroneous belief that Mrs. Marie Clark died in December, 1949 while in possession of the property, and defendant has now ascertained that the said Mrs. Clark died in Decemebr, 1948."
>
> (Note: This stipulation was signed by attorneys for all parties on various dates, the attorney for Brown Land and Royalty Company, Inc. *signing same on May 20, 1950).*

On August 30, 1950 motion and order for production of documents was filed by Brown Land and Royalty Company, Inc. directed against The Texas Company.

On September 9, 1950 Brown Land and Royalty Company, Inc. filed a pleading to amend its answ-

er and counterclaim a second time by adding thereto articles No. 27 to 31 inclusive, as follows:

27. That following the execution of the *act of donation* dated September 30, 1922 and described in article 12 of the original answer, the parties thereto and The Texas Company *interpreted the same* as operating to convey a fee title to the property therein described to Mrs. Marie M. Clark. (Note: said act of donation, as is hereinabove shown, is the notarial act wherein the Clark Heirs gave their mother the right to use during the rest of her natural life property inherited by them from their father including the property involved in this case).

28. That the said Mrs. Marie M. Clark *interpreted the instrument* as the conveyance of a fee title in performing the following acts: -

a. By mortgaging an interest in said property to Bank of New Roads on January 31, 1929.

b. By repeatedly claiming homestead exemption from 1943 to date of her death.

29. That the remaining parties to said instrument (heirs of Calvin E. Clark) evidenced their *interpretation of said instrument* as the conveyance of a fee title to the property in the following manner, to wit: -

A. By remaining silent and allowing Mrs. Marie M. Clark to claim the homestead exemption granted owners of real estate under the provisions of of the Louisiana Constitution as a-above set forth.

B. By executing that certain declaration of interest dated October 9, 1944 fully described in article 17 of the original answer herein.

30. That The Texas Company likewise *interpreted said act of donation* as conveying a fee title to Mrs. Marie M. Clark as follows, to-wit: -

A. By the payment of rentals due under the terms of the mineral lease affecting said property jointly to Mrs. Marie M. Clark and the heirs of Calvin E. Clark, said payments being made in the sum of $272.00 annually from September 28, 1944 through September 23, 1947.

B. By executing that certain declaration of interest dated October 9, 1944 hereinabove described.

31. *That under date of May 18, 1948 an oil, gas and mineral lease was executed by heirs of Calvin E. Clark to The Texas Company,* which lease affects the property involved in this suit, and appears of record on the Conveyance Records of Pointe Coupee Parish, Louisiana, in Book 21 of said records

bearing Entry No. 540; that said lease purports to affect all of the property described in Article 1 of plaintiffs' petition.

The prayer of said supplemental answer and counterclaim filed on September 9, 1950, as aforesaid, reads as follows: -

"Wherefore: defendant prays that after due proceedings had there be a judgment recognizing defendant (plaintiff in converted action) as the true and lawful owner of an undivided one-half of all the oil, gas and other minerals in and under the property described in article 1 of plaintiffs' petition, and as such entitled to the full and undisturbed possession thereof, free, clear and unaffected by that certain lease in favor of The Texas Company described in Article 31 of defendant's second supplemental answer and counterclaim."

"Defendant further prays that The Texas Company be ordered to account to your defendant for one-half of all the oil, gas and other minerals produced from the hereinabove described property from and after November 25, 1947."

"In the alternative, and in the event this court is of the opinion that Mrs. Marie M. Clark did not acquire a fee title to the property above described by virtue of the instrument dated September 30, 1922, that in such event, the *plea of estoppel* alleged herein be sustained and that defendant have judgment as hereinabove prayed for."

On October 9, 1950, there was held before Judge Christenberry a hearing on motion of plaintiffs and defendant The Texas Company to dismiss counter-

claim of Brown Land and Royalty Company, Inc. The attorneys for all parties were present and on motion of counsel for plaintiffs the firm of Durrett and Hardin were entered as co-counsel for plaintiffs. *It was stipulated* that the *motion to dismiss should apply to the pleadings as amended.* Plaintiffs offered certain documents in evidence and the matter was submitted, with counsel for defendants to have 10 days to file briefs and counsel for the plaintiff to have 10 days additional to answer.

On April 23, 1951, and after the matter had been submitted on briefs on February 2, 1951, Judge Christenberry ordered *"that the motion of the original plaintiffs,* Frances Clark Green, Agnes Clark Worsham, Florena Clark Thomas, Hattie C. Pickett, Toral E. Clark and Samuel H. Clark, and the motion of The Texas Company, defendant, *to dismiss the counterclaim and amended counterclaim filed by Brown Land and Royalty Company, Inc., be and the same are hereby granted."*

On September 19, 1951 on motion of all parties to clarify order dated April 23, 1951, Judge Christenberry issued the following order: -

> "Considering the foregoing motion and the Court feeling that the law is in favor thereof, *it is hereby ordered that a judgment be entered herein granting the motions of the original plaintiffs and The Texas Company to dismiss the counterclaims of the Brown Land and Royalty Company and said counterclaims are hereby dismissed."*
>
> "This order is entered by reason of the fact that the Court has determined that there is

no just reason for delay by reason of plaintiffs' original claim for damages which claims remain unaffected by this order."

"It is further decreed that this order shall take the place of the original order dated April 23, 1951, which through inadvertance, was not appropriately phrased."

On September 24, 1951 notice of appeal to the United States Court of Appeals for the Fifth Circuit from the order granting the Motions to Dismiss, dated September 19, 1951.

On July 18, 1952 the opinion of the United States Court of Appeals for the Fifth Circuit was filed as follows:

(Fol. 15) Opinion Of The Court - Filed July 18, 1952

In The United States Court of Appeals for The Fifth Circuit
No. 13688
and
No. 13826

Brown Land & Royalty Company, Inc., Appellant,
versus
Frances Clark Green, et al., Appellees

Appeals from the United States District Court for the Eastern District of Louisiana

(July 18, 1952)

Before Hutcheson, Chief Judge, and Russell and Rives, Circuit Judges

Rives, Circuit Judge:

This suit was originally brought by the six children and sole heirs of Calvin E. Clark against Clifford

H. Brown and Brown Land and Royalty Co., Inc. by petition filed in the state district court of Pointe Coupee Parish, Louisiana (fol. 16). It was averred that plaintiffs were owners and in possession of certain property in that parish and that defendants were slandering plaintiffs' title to such property by claiming to own certain mineral rights therein.

The cause was removed by defendants to the U. S. District Court for the Eastern District of Louisiana on the basis of diversity of citizenship. Thereafter, defendant Clifford H. Brown filed an answer disclaiming any interest in said property. Brown Land and Royalty Co., Inc. filed a counterclaim in which it assumed the status of plaintiff in a converted petitory action and asserted title to one-half of the oil, gas and other minerals under the property. It further brought in The Texas Company, appellee, as an additional party-defendant to the counterclaim, seeking thereby to obtain an accounting for one-half of the proceeds of the oil and gas being produced from the property.

Appellees, the Clark heirs, and The Texas Company, as their lessee of the propetry, filed a motion to dismiss the counterclaim for failure to state a claim upon which relief could be granted. The district court granted the motion without opinion, apparently on the theory that the pleadings and documentary exhibits in the record failed to show a title in Brown Land and Royalty Co., Inc., sufficient to sustain its burden as plaintiff in a petitory action.

The material facts, briefly stated, reveal that the property in suit was originally acquired by Calvin E. Clark, the common source of title of all parties, and that he died intestate on September 26, 1922. His six children were his (fol. 17) sole heirs, and on September 30, 1922,

they executed the so-called "donation" instrument to their mother, Marie M. Clark, the disposing portion of which reads as follows:

> "Appearers further declare that they do hereby grant, give, and bequeath unto their mother, Mrs. Marie Clark, widow of their deceased father, Calvin E. Clark, all their interest in and to their father's property, both real and personal, for her use during the rest of her natural life.
>
> "Appearers further declare that they do hereby empower and instruct their mother, Mrs. Marie Clark, to collect all accounts due said estate, to pay any and all indebtedness outstanding against same, and whatever balance may be on hand after liquidating said indebtedness, to be used by her as she may deem best in providing for her needs and requirements during the remainder of her natural life, leaving the property without a will at her death."

On October 15, 1943, Mrs. Clark joined with the heirs of Calvin Clark in the execution of a lease in favor of one G. L. Paret, which lease was subsequently assigned to The Texas Company and later released and cancelled of record. On October 9, 1944, Mrs. Marie Clark, together with the heirs of Calvin Clark and appellee, The Texas Company, executed what is termed by appellant as a "declaration of interests" or "division order" respecting the property which, according to appellants, recognizes Mrs. Clark as the owner of one-half of the minerals under the property. By that instrument, Mrs. Clark and the six Clark heirs "do declare and certify that we are the legal owners of the oil, gas and other minerals in and under the (fol. 18) hereinabove described property which is held and covered by the hereinabove described lease

and we agree, declare and authorize The Texas Company to pay any and all bonus money, rentals and/or royalties accruing under the terms of the herein above described lease in the proportions hereinbelow set forth, and that all payments so made shall fully protect said lease and The Texas Company as to the respective interests:

Owner	Fractional Interest
Marie M. Clark	½ etc."

Thereafter, on November 25, 1947, Mrs. Clark purported to convey to Clifford Brown the disputed one-half mineral interest here in suit and Brown thereafter conveyed it to appellant, Brown Land & Royalty Company, Inc. In the conveyance of Mrs. Clark to Brown, it was recited: "The herein Grantor is conveying her part of the community estate mineral interest in the above described 272 acres of land, more or less."

On May 18, 1948, the Clark heirs executed an oil, gas and mineral lease to The Texas Company, under which lease oil is being produced. Mrs. Clark died in December, 1948. Oil production was obtained from the property in October of 1949 and this suit was filed in December of that year.

The points on which appellant, Brown Land and Royalty Company, Inc., relies are (1) that under Louisiana law, the so-called donation instrument of September 30, 1922, transferred to Mrs. Marie Clark, its predecessor in title, (fol. 19) a fee title to the property as distinguished from the transfer of an usufruct; (2) that it was a bona fide purchaser for value on the faith of the public records, having acquired the property in reliance upon the so-called donation instrument and the so-called "declaration of interests" or "division order"; and (3) that The Texas Company and Mrs. Clark and the Clark

heirs having executed and recorded the "declaration of interests" dated October 9, 1944, and the Brown Company having relied thereon, that the Clark heirs and The Texas Company cannot now be heard to say that Mrs. Clark did not own one-half of the minerals under this property, and are consequently estopped to assert such claim.

The appellant concedes that, if successful, it "must recover upon the strength of its own title" and "that the proper disposition of this case depends upon the legal results flowing from the Donation dated September 30, 1922, and the Declaration of interests dated October 9, 1944." It concedes further "that under the law of Louisiana an instrument must be considered as a whole and any ambiguity therein must be construed against a donee."

The "donation" grants rights to Mrs. Clark "for her use during the rest of her natural life" and "to be used by her as she may deem best in providing for her needs and requirements during the remainder of her natural life, leaving the property without a will at her death."

This Court is not the final authority on questions of Louisiana land law and there would be little profit in our engaging in an extensive discussion of just when an instrument (fol. 20) conveys a fee title and when it evidences the transfer of a usufruct only. It suffices to say that after carefully considering the authorities relied upon by the appellant and those relied on by the appellees, we are left under the clear conviction that the "donation" evidences the transfer of a usufruct only and not a fee title.

Since the law fixed no particular division of rents or royalties as between a usufructuary and the owners, of the fee, it was natural that The Texas Company for its own protection should insist upon a contractual division

between Mrs. Clark and the Clark heirs, and this division was made in the so-called "declaration of interests" or "division order" in the proportion of one-half to the Clark heirs. But the instrument nowhere recites that Mrs. Clark ever owned any undivided interest in such property. It neither conveyed title to Mrs. Clark nor recognized any title in her, but without undertaking to determine the separate title of each of the parties, merely fixed the division of royalties, if any, that might be obtained from the lease. What was actually divided in that instrument was the bonus money, rentals, and royalties accruing but not the title or ownership of the minerals, so that when the lease (to Paret assigned to The Texas Company) was cancelled the division order became a nullity.

Furthermore, Mrs. Clark's "community estate" purported to be conveyed to Clifford Brown would not flow (fel. 21) from either the "donation" or the "declaration of interests." It is conceded that Mrs. Clark had no community estate and that the property was acquired by her husband before their marriage. In any event, when the terms of the "donation" and of the "declaration of interests" are clearly understood neither of those documents could form the basis for the appellant to secure title either as a good faith purchaser or by way of estoppel against the appellees.

The judgment is

Affirmed.

(fol. 22) Judgment

Extract from the Minutes of July 28th., 1952

No. 13826

Brown Land & Royalty Company, Inc.

vs.

Frances Clark Green, et al.

This cause came on to be heard on the transcript of the record from the United States District Court

for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, Brown Land and Royalty Company, Inc. be condemned, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

On September 2, 1952 an order was issued *denying a rehearing.*

On January 5, 1953 the petition of Brown Land and Royalty Company, Inc. vs. Frances Clark Green, et als, for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, brought before the Supreme Court of the United States was denied by said Court.

Obviously, the following conclusions of the United States Circuit Court of Appeals for the Fifth Circuit are binding on and constitute the law of the case between the parties in the present case before this Court: -

1. The said donation from the Clark Heirs to their mother Mrs. Marie M. Clark, "evidences the *transfer of a usufruct only* and *not a fee title.*"

2. The so-called "declaration of interests" or "division order" in proportion of one-half to the *usufructuary* Mrs. Marie M. Clark and one-half to the Clark Heirs neither conveyed title to Mrs. Clark *nor* recognized any title in her, and *is* merely

a *contractual division* between Mrs. Clark and the Clark Heirs to protect The Texas Company because *the law fixed no particular division of rents or royalties between the usufructuary and the owners of the fee.*

3. "Furthermore, Mrs. Clark's community estate purported to be conveyed to Clifford Brown *would not flow from* either the 'Donation' or the 'declaration of interests'. *It is conceded that Mrs. Clark had no community estate and that the property was acquired by her husband before their marriage. In any event,* when the terms of the 'donation' and of the 'declaration of interests' *are clearly understood neither of these documents could form the basis for the appellant to secure title either as a good faith purchaser or by way of estoppel against the appellees.*"

That the said donation on September 30, 1922 from the Clark Heirs to their mother Mrs. Marie M. Clark "*evidences the transfer of a usufruct only and not a fee title*" cannot be any further disputed by the parties herein, and it is a closed and settled issue resulting from the said first petitory action above referred to. This means that the usufructuary Mrs. Marie M. Clark had the legal right during her lifetime to enjoy by herself, or lease, or to even sell or give the rights of usufruct granted her in the said act of donation, *but whatever contracts or agreements she made in respect to said usufruct,* or for whatever duration she may have intended to give them, *ceased at the moment of her death when the said usufruct expired by operation of law.* And immediately on the death of Mrs. Marie M. Clark on December 24, 1948, the said usufruct

of said interest in mineral rights granted and donated to their said mother by the Clark Heirs, *by operation of law, returned* to and *became again incorporated* with the *ownership* and *fee title* of the Clark Heirs in and to the property involved in this case, and did not in any manner become a part of or connected with their said mother's succession in any manner whatsoever.

It has also been settled in the said first petitory action between the parties herein that neither the said "donation" by the Clark Heirs to their said mother Mrs. Marie M. Clark *nor* the said "declaration of interests", fully described and discussed above, *by their terms*, "could form the basis for the appellant (Brown Land and Royalty Company, Inc.) *to secure title of the property described herein either as a good faith purchaser or by way of estoppel against the appellees* (the Clark Heirs and The Texas Company)." (Note: Parenthesis by the Court).

It has also been judically admitted, conceded, and settled in said converted petitory action between the parties herein that the property involved in the present case was acquired by Calvin E. Clark, the husband of Mrs. Marie M. Clark, before their marriage and was not community property, that there existed no community estate or property belonging thereto, and that Mrs. Clark's "community estate" purported to be conveyed to Clifford Brown, purported author in title of Brown Land and Royalty Company, Inc., would not flow from either the said "donation" or the said "declaration of interests" mentioned above.

And in the said converted petitory action which Brown Land and Royalty Company, Inc. removed to the federal district, as aforesaid, in its original and amended pleadings, it raised several pleas of estoppel as to the execution of and recordation of the various instruments constituting a part of the record in said case, as to the purported representations contained in said instruments, and the purported interpretations placed on said documents by the parties defendant in the present case and Mrs. Marie M. Clark, all of which were unacceptable to and rejected by the Federal District Court, The Circuit Court of Appeals and the Supreme Court of the United States. And it is recalled, as shown above, that those said pleas of estoppel included alleged reliance by Brown Land and Royalty Company, Inc. on: -

1. the execution, contents and recordation of the said purported transfer by Mrs. Marie M. Clark to Clifford Brown of certain mineral rights in and to the property involved in the previous and present petitory actions between the parties herein;

2. the purported interpretation placed by Mrs. Marie M. Clark, the Clark Heirs and The Texas Company on the documents referred to above as the "donation" and the "declaration of interests" to the effect that a fee title and not usufruct was intended by the parties thereto as to the said property described in said instruments and involved in the previous and

present petitory actions between the parties herein; and also

3. the representations made and contained in said purported statements or assertions attributed to Mrs. Marie M. Clark and Mrs. Frances Clark Green as above set forth.

Obviously, the said pleas, which were raised in and rejected by the said Courts of the United States, as aforesaid, included the plea of estoppel setting up Mrs. Marie M. Clark's purported warranty of the fee title of the property described in the said instrument executed between Mrs. Clark and Clifford Brown and in said other instruments, and by said final judgments of the United States Court of Appeals for the Fifth Circuit and the Supreme Court of the United States, the said plea of estoppel by warranty of Mrs. Clark is and should be considered as a closed and settled issue between the parties to the present controversy.

Now, the said plea of estoppel by warranty, *a species of estoppel by deed*, sought to be employed herein by Counsel for plaintiff Brown Land and Royalty Company, Inc., relates to cases where the heirs, accepting a succession unconditionally, claim the property belonging to the decedent as successors or privies to the deceased warrantor. Such a plea of estoppel does not and cannot apply under the law and jurisprudence of Louisiana in a case like the present petitory action where the defendants are both the owners and possessors of said property, not by in-

heritance from their said mother, but by another distinct title and inheritance from their father Calvin E. Clark whose death occurred on September 22, 1922, many years prior to the death of their mother Mrs. Marie M. Clark on December 24, 1948.

And said plea of estoppel by warranty cannot be used herein by plaintniff Brown Land and Royalty Company, Inc. to create and establish in itself a fee title and ownership to the property involved herein by parol evidence where no such title previously existed and where defendants the Clark Heirs, *are and have been as the heirs of their said father*, the owners and possessors of said property and have been for many years prior to the death of their said mother Mrs. Marie M. Clark on December 24, 1948.

Then, since the only interest which Mrs. Marie M. Clark ever had in the property involved herein was *the right of usufruct* acquired by her in the said donation from the Clark Heirs, Mrs. Clark had no interest whatever in said property or mineral rights therein that could become and constitute a part of her succession at her death, as is hereinabove shown. And since estoppel by warranty is a species of estoppel by deed whereby only the parties to the deed including the *grantor* and the successors and privies in title therefrom are prevented from denying or estopped to deny the truth of any material fact asserted in the deed, and since the Clark Heirs do not succeed to the title of said property and mineral rights therein as successors or privies of Mrs. Clark but under a prior

distinct and independent title as heirs of their predeceased father Calvin Clark, the raising of the purported issue of the unconditional acceptance by the said Clark Heirs of the succession of their mother which does not include said property and mineral rights therein is and would be immaterial in determining herein the actual ownership and title of said property and mineral rights in question and could and would not bind the said Clark Heirs as to said purported warranty by deed of their said mother because their ownership and possession of said property and the minerals therein arise from a prior independent title from their predeceased father and not as successors and privies of their said mother under said purported warranty deed or instrument in which the said mother was the grantor.

And even though plaintiff made allegations in the original petition of the present petitory action tending to create the impression that an erroneous date of Mrs. Clark's death was given in the administration proceedings of her succession in order to cause Brown Land and Royalty Company, Inc., said plaintiff, to believe that the Clark Heirs could not and did not accept their mother's succession; - in its second supplemental and amended petition herein it, Brown Land and Royalty Company, Inc., retracted said allegations and sought to strike out articles 15 and 16 of said original petition containing said recitals as to the erroneous date of Mrs. Clark's death. And the remainder of said supplemental and amended petition consisted entirely of allegations showing that *plaintiff and its counsel knew on March 23, 1950* that Mrs. Clark was dead and further allegations seeking to explain and justify the in-

action of plaintiff and the long delay prior to the filing of this suit.

Then, on page 2 of his original brief counsel for plaintiff here asserts: -

> "The basis of plaintiff's cause of action in the Federal Court suit was that the donation instrument executed by the Clark Heirs operated to convey a fee title to their mother. That contention was denied by the Court. In this suit, plaintiff contends that even if Mrs. Clark did not own a title in these minerals, that, nevertheless, she executed a warranty deed to Clifford Brown and that her heirs became bound by her warranty when they accepted her succession. The basis of this cause of action in this case is the warranty of the Clark Heirs and is a very different thing from the contention that Mrs. Clark was the fee owner."

In the said quoted part from its original brief herein, plaintiff overlookes the fact that the execution, contents and recordation of the said purported act of transfer to Clifford Brown by Mrs. Marie M. Clark of, in and to the property involved herein including the said purported warranty of title therein by Mrs. Clark, - the purported interpretation placed by Mrs. Clark, the Clark Heirs and The Texas Company on the said "donation" and "declaration of interests" instruments duly recorded on the public records that transfer of a *fee title* instead of *a usufruct* was intended by said parties, - and that repre-

sentations and statements purportedly made by Mrs. Clark and Mrs. Green as to the ownership of said mineral rights, - all were made by pleadings the basis of pleas of estoppel filed by Brown Land and Royalty Company, Inc. in federal court. Said quoted part of plaintiff's original brief also does not take into consideration the fact (1) that estoppel by warranty is a species of estopel by deed and is only applicable to the parties to the deed containing the purported warranty including the grantor and the successors and privies in title fromthe grantor signing such a deed and (2) that the plea of estoppel by warranty precludes and prohibits only the grantor and his privies and successors in title from denying as the truth any material fact asserted in the deed or instrument in question by the grantor therein. The quoted part of said brief also disregard the undisputed and admitted fact that the Clark Heirs and The Texas Company do not succeed to the title of said mineral rights in said property as successors and privies of Mrs. Marie M. Clark but under a prior distinct title and independent title acquired by the Clark Heirs by inheritance as the heirs of their predeceased father Calvin E. Clark unaffected by any purported unconditional acceptance by the Clark Heirs of the succession of their mother which did not and could not by law include said property or mineral rights therein.

Said brief of plaintiff, as above quoted, fails to recognize and give consideration to the following: -

1. That a plea of estoppel, including estoppel by warranty cannot be used by a party to create

and establish in said party a title and ownership of property or mineral *rights therein by parol evidence where no such title previously existed and where the party is and has not been in possession of same as such owner.*

2. That in a petitory action the plaintiff can only recover on the strength of its own title and not on any asserted weakness of the title of its adversary.

3. That even if the fact that plaintiff herein filed and presented the plea of estoppel in warranty in the federal court would be pretermitted herein, and it is not, and even if *the decision* in the said prior petitory action by the federal courts that the "donation" or the said "declaration of interests" could not form the basis for Brown Land and Royalty Company, Inc., to secure a title as a good faith purchaser or by way of estoppel against the Clark Heirs and The Texas Company be disregarded and pretermitted herein, and it is not, plaintiff would be confronted by the rule that in a petitory action the plaintiff must assert all the titles and claims to the property or mineral interest therein which he has or feels that he may have at his command and the plaintiff is not at liberty to reserve what he pleases to make it the basis of new litigation.

And the following authorities are pertinent:

(1) R.C.C. Article 226,

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

(2) Harvey v. Richard
7 So. 2d. 674 (200 La. 97):

P. 677: "The sale of a thing belonging to another person is null....." (Article 2452 of the Revised Civil Code), and *"It is axiomatic under the law and jurisprudence of this state that parol evidence is inadmissible to create a title in one who never owned the property* - - - (Cerami v. Harris, 187 La. 701, 175 So. 462, 464, and the authorities therein cited) - *except where the record owner confesses* when interrogated, under oath that the property belongs to the claimant, and, *in those instances, only when actual delivery has been made to the claimant.* Articles 2275, etc., of the Revised Civil Code. See also numerous cases cited....."

P. 677. "The cases holding that estoppels are not favored by our courts *are legion* in our jurisprudence. Whenever estoppel is pleaded as an element of a cause of action, *it must be pleaded specifically*, the burden of proving the

facts upon which the estoppel is founded, *as well as the affirmative showing that* he was *misled by the acts and forced to act to his prejudice, resting upon the party invoking the doctrine.* Cases cited....."

(3) Chachere et al v. Superior Oil Co. et al
187 So. 321 (192 La. 193)

In petitory action, plaintiffs must rely on strength of their own title, not weakness of defendants' title, which is not at issue until plaintiffs prove apparent valid title in themselves.

(4) 14 Ann. 575
Shaffer vs. Scuddy

In a petitory action, the defendant is bound to plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as res judicata against any title which the defendant was possessed at the time.

(5) Adkins' Heirs v. Crawford, Jenkins and Booth, Limited et al

24 So. 2dS 246 (209 La. 46): -

In petitory action defendant must plead all titles under which he claims to be owner, and final judgment rendered in favor of plaintiff may be pleaded as res judicata against any title which defendant was possessed of at the time but omitted to plead.

(6) Gagon v. Patout & Burgueres
135 La. 156 (65 So. 17):

But a party litigant, whether plaintiff or defendant, is bound to set up whatever may be at his command, or within his knowledge, and is not at liberty to reserve what he pleases and make it the basis of new litigation.

(7) Hargrove vs. Mouton
109 La. 533

A plaintiff in a petitory action must declare upon all the titles held by him at the time the suit is brought, through which he pretends to the ownership of the land involved.

(8) A plaintiff in a petitory action must assert all his titles and claims to the property involved which are in existence at the time of the filing of the suit. Among the cases which announce this rule are the following:

Williams v. Close, 12 La. Ann. 873 (1857)

Broussard v. Broussard, 9 So. 910, 43 La. Ann. 921 (1891)

Brigot's Heirs v. Brigot, 17 So. 825, 47 La. Ann. 1304 (1895)

Brigot's Heirs v. Brigot, (Lamarque, et al Intervenors), 22 So. 651, 49 La. Ann. 1428 (1897)

Howcott v. Petitt, 31 So. 61, 106 La. 530 (1901)

Lindquist v. Maurepas Land & Lbr. Co., 36 So. 843, 112 La. 1030 (1903)

Succession of Whitner, 116 So. 180, 165 La. 769 (1928)

Morgan v. Calliham, 171 So. 132, (CCA 2nd - 1936)

Pitts v. Neugent, et al, 175 So. 460, 187 La. 694 (1937)

(9) Pitts et al v. Neugent et al
175 So. 460 (187 La. 694): -

Matters once determined by court of competent jurisdiction, if judgment has become final, cannot again be called into question by parties on their privies, though judgment may have been erroneous. (Rev. Civ. Code, Arts. 2286, 3556).

(10) Succession of Whitner
165 La. 769 (116 So. 180)
Morgan v. Calliham
171 So. 132:

A final judgment of a court having jurisdiction over the parties and the subject matter *puts an end to every plea or defense made, and to every plea or defense which either of the parties might successfully have made.*

(11) Himel v. Connelly
197 So. 424 (195 La. 769:

P. 427: "There are decisions recognizing three exceptions to the general rule which we have quoted, but the exceptions are not pertinent to this case. *One of the exceptions that was made is that in a petitory action the parties to the suit must assert whatever titles they have, and*

not hold back any claim for future litigation. (Cases cited)_____."

(12) 21 C. J., Par. 185, P. 1182, Estoppel.

Heirs and Personal Representatives. An heir stands in privy with the ancestor; and an estoppel in pais enforceable against the ancestor is likewise enforceable against the heirs. *However, the heirs are not bound by an estoppel against the ancestor where they do not claim in the same right.*

(13) 21 C. J., Par. 107 (2) Heirs and Devisees, Estoppel, P. 1108: -

"_____As a general rule the heirs or devisees are estopped only where they claim through the ancestor or testator. Ordinarily an heir or devisee claiming an independent title in himself, is not estopped._____etc."

(14) Gaines v. Crichton
174 So. 666 (187 La. 345):

P. 667: "*Estoppel by warranty is an estoppel based on the principle of giving effect to the manifest intention of the grantor,* and of preventing the grantor from derogating or destroying his own grant by any subsequent act. *It is a species of estoppel by deed. The party to the deed and his privies are estopped from denying the truth of any material fact asserted in the deed.* Lewis v. King 157 La. 718, 103 So. 19."

(15) Lewis v. King et al
157 La. 718

Estoppel precludes assertions of fact, not law. *Estoppel by warranty is estoppel based on principle* of giving effect to manifest intent of grantor and of preventing grantor from derogating or destroying his own grant by subsequent act.

Party to deed and privies are estopped from denying truth of any material fact asserted in it.

(16) Otis et al v. Texas Co. et al
153 La. 384

Purchaser is bound to ascertain nature of title of property which he seeks to purchase and in looking up titles, must examine them act by act and mortgage by mortgage.

(17) Parker v. Ohio Oil Co.
186 So. 604 (191 La. 896):

One who does not take advantage of a public record as an available means of information as to questions of title cannot claim an estoppel against one who merely fails to furnish such information.

(18) 21 C.J. Estoppel, Par. 106, P. 1108: Who are privies (1) In General. It follows from the definition of privity that a person is not Bound as a privy by an estoppel against another, nor may he urge it, unless he succeeds to that other's possession or hold in subordination to it; *persons claiming under an independent title are not estopped.* ..... etc."

(19) Gosserand v. Monteleone
164 La. 397

Decision on appeal from judgment dismissing suit on exception of no cause of action must be accepted as settled "law of the case" on subsequent appeal.

See also: City of Shreveport v. Kansas City Southern Ry. Co. et als 190 So. 404 (193 La. 277)

Doullant et al v. Rush et al
144 La. 479 (80 So. 665)

(20) Hanby v. Texas Co.
140 La. 189, 72 So. 933

Conveyance of mineral rights relates to immovables, and title thereto can not be destroyed and new title created by parol.

(21) Schexnayder v. Unity Industrial Life Ins. Co., Inc., 174 So. 154 - Ct. Appeal, 1st. Circuit
P. 151: "Where a judgment sustains an exception of no cause or right of action, and the exception is aimed at and involves the merits of a plaintiff's demand, this judgment can be the basis for the plea of res adjudicata the same as if the judgment had been rendered on submitted evidence. Laenger v. Laenger, 138 La. 532 (70 So. 501); Ducors v. St. Bernard Cypress Co., 164 La. 787, 114 So. 654."

See also: Slattery v. Arkansas Natural Gas Co., et al 138 La. 793 - P. 803.

(22) R. C. C. - Art. 555:

> Alienation. The usufructory may enjoy by himself or lease to another, or even sell or give away his right; but all the contracts or agreements which he makes in this respect whatever duration he may have intended to give them, cease of right at the expiration of the usufruct.

(23) R. C. C. - Art. 606;

> Termination by death. The right of the usufruct expires at the death of the usufructuary.

(24) R. C. C. - Art. 625;

> Exipration - Effect. When the usufruct has expired it returns to and become again incorporated with the ownership; and from that time the person who had the naked ownership begins to enter into a full and entire ownership of the thing."

(25) Sevier v. Douglas
44 Ann. 605

> As right of usufruct expires at death of usufructuary, heir does not receive by descent if mother was a usufructuary.
>
> See also: Dickson v. Dickson, 33 Ann. 1370.

For the foregoing reasons, and in the light of the authorities hereinabove mentioned, it is the opinion of the Court that judgment should be rendered herein in favor of Defendants and Exceptors, Hattie C. Pickett, Toral E. Clark, Samuel H. Clark, Frances Clark Green, Florena

Clark Worsham, and The Texas Company, and against the Plaintiff, Brown Land and Royalty Company, Inc., sustaining the said Exception and Plea of Res Judicata, the Exception of No Cause of Action and the Exception of No Right of Action, and dismissing this petitory action at Plaintiff's costs, and judgment is rendered herein accordingly.

THUS DONE, READ, RENDERED AND SIGNED in Open Court at New Roads, Louisiana, on this 4th day of August, 1953.

s/s C. IRIS DUPONT
JUDGE, Eighteenth Judicial District

Filed August 4th, 1953

J. W. POWELL
Clerk of Court

Attest: A true Copy, Clerk's Office
New Roads, La., Aug. 4, 1953

J. W. POWELL,
Clerk of Court.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13688
and
No. 13826

BROWN LAND & ROYALTY COMPANY, INC.
Appellant

versus

FRANCES CLARK GREEN, ET AL
Appellees

Appeals from the United States District Court for the Eastern District of Louisiana — (July 18, 1952)

Before Hutcheson, Chief Judge, and Russell and Rives, Circuit Judges

RIVES, Circuit Judge:

This suit was originally brought by the six children and sole heirs of Calvin E. Clark against Clifford H. Brown and Brown Land and Royalty Co., Inc., by petition filed in the state district court of Pointe Coupee Parish, Louisiana. It was averred that plaintiffs were owners and in possession (fol. 18) of certain property in that parish and that defendants were slandering plaintiffs title to such property by claiming to own certain mineral rights therein.

The cause was removed by defendants to the U. S. District Court for the Eastern District of Louisiana on

the basis of diversity of citizenship. Thereafter, defendant Clifford H. Brown filed an answer disclaiming any interest in said property. Brown Land and Royalty Co., Inc., filed a counterclaim in which it assumed the status of plaintiff in a converted petitory action and asserted title to one-half of the oil, gas and other minerals under the property. It further brought in the Texas Company, appellee, as an additional party-defendant to the counterclaim, seeking thereby to obtain an accounting for one-half of the proceeds of the oil and gas being produced from the property. Appellees, the Clark heirs, and The Texas Company, as their lessee of the property, filed a motion to dismiss the counterclaim for failure to state a claim upon which relief could be granted. The district court granted the motion without mentary exhibits in the record failed to show a title in Brown Land and Royalty Co., Inc., sufficient to sustain its burden as plaintiff in a petitory action.

The material facts briefly stated, reveal that the property in suit was originally acquired by Calvin E. Clark, the common source of title of all parties, and that he died intestate on September 26, 1922. His six children were his (fol. 19) sole heirs, and on September 30, 1922, they executed the so-called "donation" instrument to their mother, Marie M. Clark, the disposing portion of which reads as follows:

"Appearers further declare that they do hereby grant, give and bequeath unto their mother, Mrs. Marie Clark, widow of their deceased father, Calvin E. Clark,

all their interest in and to their father's property, both real and personal, for her use during the rest of her natural life.

"Appearers further declare that they do hereby empower and instruct their mother, Mrs. Marie Clark to collect all accounts due said estate, to pay all indebtedness against same, and whatever balance may be on hand after liquidating said indebtedness, to be used by her as she may deem best in providing for her needs and requirements during the remainder of her natural life, leaving the property without a will at her death."

On October 15, 1943, Mrs. Clark joined with the heirs of Calvin Clark in the execution of a lease in favor of one G. L. Paret, which lease was subsequently assigned to The Texas Company and later released and cancelled of record. On October 9, 1944, Mrs. Marie Clark, together with the heirs of Calvin Clark and appellee, The Texas Company, executed what is termed by appellant as a "declaration of interests" or "division order" respecting the property which, according to appellants, recognizes Mrs. Clark as the owner of one-half of the minerals under the property. By that instrument, Mrs. Clark and the six Clark heirs "do declare and certify that we are the legal owners of the oil, gas and other minerals in and under the hereinabove described (fol. 20) property which is held and covered by the hereinabove described lease and we agree, declare and authorize The Texas Company to pay any and all bonus money, rentals and/or royalties under the terms of the hereinabove described

lease in the proportions hereinbelow set forth, and that all payments so made shall fully protect said lease and The Texas Company as to the respective interests:

Owner, Marie M. Clark, Fractional Interest ½ etc."

Thereafter, on November 25, 1947, Mrs. Clark purported to convey to Clifford Brown the disputed one-half mineral interest here in suit and Brown thereafter conveyed it to appellant, Brown Land & Royalty Company, Inc. In the conveyance of Mrs. Clark to Brown, it was recited: "The herein Grantor is conveying her part of the community estate mineral interest in the above described 272 acres of land, more or less."

On May 18, 1948, the Clark heirs executed an oil, gas and mineral lease to The Texas Company, under which lease to The Texas Company, oil is being produced. Mrs. Clark died in December, 1948. Oil production was obtained from the property in October of 1949 and this suit was filed in December of that year.

The points on which appellant, Brown Land and Royalty Company, Inc., relies are (1) that under Louisiana law, the so-called donation instrument of September 30, 1922, transferred to Mrs. Marie Clark, its predecessor in title, a (fol. 21) fee title to the property, as distinguished from the transfer of an usufruct; (2) that it was a bona fide purchaser for value on the faith of the public records, having acquired the property in reliance upon the so-called donation instrument and the so-called "de-

claration of interests" of "division order"; and (3) that The Texas Company and Mrs. Clark and the Clark heirs having executed and recorded the "declaration of interests" dated October 9, 1944, and the Brown Company having relied thereon, that the Clark heirs and The Texas Company cannot now be heard to say that Mrs. Clark did not own one-half of the minerals under this property, and are consequently estopped to assert such claim.

The appellant concedes that, if successful, it "must recover upon the strength of its own title" and "that the proper disposition of this case depends upon the legal results flowing from the Donation dated September 30, 1922, and the Declaration of interests dated October 9, 1944." It concedes further "that under the law of Louisiana an instrument must be considered as a whole and any ambiguity therein must be construed against a donee."

The "donation" grants rights to Mrs. Clark "for her use during the rest of her natural life" and "to be used by her as she may deem best in providing for her needs and requirements during the remainder of her natural life, leaving the property without a will at her death."

This Court is not the final authority on questions of Louisiana land law and there would be little profit in our engaging in an extensive discussion of just when an instrument (fol. 22) conveys a fee title and when it evidences the transfer of a usufruct only. It suffices to say that after carefully considering the authorities relied

upon by the appellant[1] and those relied on by the appellees[2], we are left under the clear conviction that the "donation" evidences the transfer of a usufruct only and not a fee title.

Since the law fixed no particular division of rents or royalties as between a usufructuary and the owners of the fee, it was natural that The Texas Company for its own protection should insist upon a contractural division between Mrs. Clark and the Clark heirs, and this division was made in the so-called "declaration of interests" or "division order" in the proportion of one-half to the usufructuary ————————

[1]Mainly Succession of Ledbetter, 147 La. 771; Succession of Hunter, 159 La. 492; Succession of Heft, 163 La. 467; Succession of Williams, 169 La. 696, 125 So. 858; Succession of Feitel, 176 La. 543, 146 So. 145.

[2]Principally Gibson vs. Zylks, 186 La. 1943, 173 So. 757; Creech vs. Errington, 207 La. 615, 21 So. 2d 761; Succession of Law, 31 La. Ann. 456, and Succession of Fertel, 208 La. 614, 23 So. 2d 234.

and one-half to the Clark heirs. But the instrument nowhere recites that Mrs. Clark ever owned any undivided interest in such property. It neither conveyed title to Mrs. Clark nor recognized any title in her, but without undertaking to determine the separate title of each of the parties, merely fixed the division of royalties, if any, that might be obtained from the lease. What was actually

divided in that instrument was the bonus money, rentals, and royalties accruing but not the title or ownership of the minerals, so that when the lease (to Paret assigned to The Texas Company) was cancelled the division order became a nullity.

Furthermore, Mrs. Clark's "community estate" purported to be conveyed to Clifford Brown would not flow (fol. 23) from either the "donation" or the "declaration of interests." It is conceded that Mrs. Clark had no community estate and that the property was acquired by her husband before their marriage. In any event, when the terms of the 'donation" and of the "declaration of interests" are clearly understood neither of those documents could form the basis for the appellant to secure title either as a good faith purchaser or by way of estoppel against the appellees. The Judgment is Affirmed.

FILED
JAN 14 1955
HAROLD B. WILLEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 492

BROWN LAND & ROYALTY COMPANY, INC.,
Petitioner and Appellant below,

VERSUS

HATTIE C. PICKETT, ET ALS,
Respondents and Appellees below.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF OF RESPONDENTS, APPELLEES BELOW, HATTIE C. PICKETT, ET AL, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

RICHARD C. CADWALLADER,
Member of the Bar of the Supreme Court of the United States
Post Office Address: 314 Louisiana National Bank Building, Baton Rouge, Louisiana.
Counsel for Respondents, Hattie C. Pickett and Frances Clark Green and Agnes Clark Worsham and Florena Clark Thomas and Toral E. Clark and Samuel H. Clark.

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Baton Rouge, Louisiana.

Franklin Press, Inc. Baton Rouge, La.

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To the Honorable the Supreme Court of the United States:

Although respondents are not satisfied that the petition for certiorari is in substantial compliance with the Rules of this Court, this brief in opposition to the petition will be limited to two points—(1) No Federal question has ever

been presented in this case, and (2) The suggestion of an alleged Federal question which was first made in an application for a re-hearing to the Louisiana Supreme Court was not timely, and hence this Court is without jurisdiction to entertain the petition.

ARGUMENT

1.

No Federal Question Is Presented.

Petitioner, as plaintiff, sought title to a real right in Louisiana immovable property. That claim was finally and conclusively adjudicated as the opinions attached to the application of petitioner as Appendices demonstrate.

Petitioner then brought a second suit making the same claim. The Louisiana Supreme Court sustained a plea of res judicata. The opinion of the Chief Justice of the Louisiana Supreme Court, reproduced as Appendix A (pages 8-12) by petitioner, shows conclusively that:

> ". . . there is no confusion with respect to the application of the law with respect to the plea of res judicata in petitory actions, for our jurisprudence uniformly requires that parties litigant in a petitory action, whether plaintiff or defendant, set up whatever title or defense they may have or a judgment thereon will bar a second suit based on a right or claim which existed at the time of the first suit, even though omitted therefrom (citing authorities) . . .
>
> "This exception is, of course, predicated on the necessity of insuring that there be some measure of stability in titles to realty, and also to prevent undue hardship and/or fraud with respect to the rights of innocent third parties purchasing real rights on the strength of judicial pro-

nouncements relative thereto, as well as to obviate a multiplicity of suits."

It is difficult indeed to endeavor to determine from the petition for certiorari exactly what constitutional provision, treaty, statute, ordinance or regulation petitioner claims is involved to give this Court jurisdiction. No such provision, treaty, statute, ordinance or regulation is set out verbatim in the petition or any Appendix thereto, or, for that matter, even referred to by correct citation. Apparently petitioner intends to rely on the Fourteenth Amendment of the Constitution, and we so assume.

On page 2, under the heading of "JURISDICTION," petitioner mentions Tit. 28, Section 1257 of the United States Code, as a basis for invoking the jurisdiction of this Court.

It is there provided that final judgments or decrees rendered by the highest Court of a State may be reviewed by the Supreme Court:

> "By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or an authority exercised under, the United States." (Emphasis supplied.)

Your Honors will search the record in this case in vain to find that anywhere at anytime—except possibly in its petition for rehearing hereafter mentioned—petitioner ever "specially set up or claimed" any title, right, privilege or immunity

under the Constitution, or any treaty or statute of the United States.

Rule 23-1(f) carries into effect the provisions of Tit. 28, Section 1257, of the United States Code, by providing that a petition for certiorari seeking review of the judgment of a State Court shall also:

> ". . . specify the stage in the proceedings in the Court of first instance and in the appellate court, at which, and in the manner in which, the **federal questions** sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis supplied.)

Petitioner has largely glossed over this requirement by stating on pages 4 and 5 of its petition that a purported Federal question was raised because petitioner in its original petition pleaded that "the matters pleaded and argued in the Federal Court proceedings were entirely different from the facts pleaded and relied upon in the present proceedings," and because the present defendants (respondents here) pleaded that the Federal Court judgment was res judicata.

We submit that when Your Honors read pp. 4-11 of the Record to which petitioner refers as its pleadings which al-

legedly raised a Federal question, Your Honors will see that, to the contrary, no alleged Federal question was ever raised at all or disposed of in any of the Louisiana State Courts.

The Louisiana Supreme Court applying Louisiana law with respect to res judicata, refused to permit petitioner to relitigate over a Louisiana land title where all issues which were or could have been raised were and are foreclosed under established and uniform Louisiana law. This obviously presents no Federal question.

2.

The Alleged Federal Question Was Not Timely Raised.

It is true that in a petition for re-hearing filed in the Louisiana Supreme Court, petitioner very vaguely and in the most general terms belatedly endeavored to inject into this case the suggestion that it had not been accorded the due process of law guaranteed by the Fourteenth Amendment. This petition for rehearing was the very first suggestion in this record that petitioner contended that it had not been accorded due process of law.

The Louisiana Supreme Court, without opinion, denied a rehearing.

It is the uniform jurisprudence of this Honorable Court that an alleged Federal question raised for the first time in an application for rehearing to a State Court, is not "timely and properly raised," and cannot serve as a basis for giving this Court jurisdiction for review by writ of certiorari.

Godchaux Company v. Estopinal, 40 S. Ct. 116, 251 U.S. 179, 64 L. Ed. 213;

Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 11 S. Ct. 11, 137 U.S. 48, 34 L. Ed. 614;

Corkran Oil & Development Company v. Arnaudet, 26 S. Ct. 41, 199 U.S. 182, 50 L. Ed. 143.

Your Honors said in the case of *Godchaux Company v. Estopinal*, supra, this:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner, and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

In this case the Louisiana Supreme Court did **not** entertain the petition, but denied rehearing without opinion.

CONCLUSION

It is submitted that no Federal question whatever has ever been presented in this case.

Assuming arguendo (but by no means admitting) that a Federal question is suggested by the record, it is submitted that under Title 28, Section 1257 of the United States Code, and under the Rules of this Court, the Court is without jurisdiction to entertain the petition for certiorari. This is true because (1) no title, right, privilege or immunity was or is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States (See Tit. 28, Section 1257, U.S.C.); and (2) Rule 23-1 (d) and Rule 23-1 (f) were not complied with.

No alleged Federal question was ever raised in any State Court of Louisiana in this proceeding except conceivably by

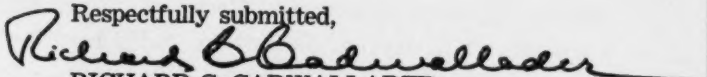
petitioner's petition for rehearing to the Louisiana Supreme Court. The petition for rehearing was denied without opinion.

Your Honors have uniformly held that in those circumstances a Federal question, even if it did exist, was not timely raised, and that for that reason certiorari will be denied.

We respectfully submit that for the reasons above set out, this Court is without jurisdiction to entertain the petition, and for that reason the petition should be dismissed; alternatively, and in any event, none of the reasons suggested by Rule 19 of the Rules of this Court exist here for granting certiorari and there are no other special or important reasons which call for this case to be reviewed on certiorari.

It is submitted that the petition for certiorari be dismissed, and alternatively that it be denied.

Respectfully submitted,



RICHARD C. CADWALLADER,

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Counsel for Respondents, Hattie C. Pickett and Frances Clark Green and Agnes Clark Worsham and Florena Clark Thomas and Toral E. Clark and Samuel H. Clark.

Of Counsel:

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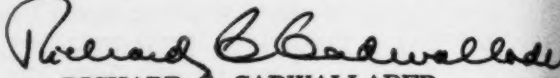
New Roads, Louisiana
Charles H. Dameron,
Calvin E. Hardin, Jr.,
Bert E. Durrett,
Wallace A. Hunter,
Baton Rouge, Louisiana

CERTIFICATE OF SERVICE

I certify that three copies of the above and foregoing brief have this day been served uopn each counsel for petitioner by mailing same, first class postage prepaid, to Robert G. Chandler, Esquire, Attorney at Law, 918 Commercial Building, Shreveport, Louisiana, and to Frank J. Looney, Esquire, Attorney at Law, 615 Herndon Avenue, Shreveport, Louisiana, Attorneys of Record for petitioner, the mailing address of each of said attorneys being less than 500 miles from Baton Rouge, Louisiana, the place of said mailing.

Baton Rouge, Louisiana, this 12th day of January, 1955.



RICHARD C. CADWALLADER,
Counsel for respondents above named.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 492

BROWN LAND & ROYALTY CO., INC.,
Petitioner,

versus

HATTIE C. PICKETT, ET ALS.,
Defendants.

PETITION FOR A REHEARING ON APPLICATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

To the Honorable the Supreme Court of the United States:

Now into Court comes Brown Land & Royalty Company, Inc., petitioner herein, and files this, its petition for a rehearing, pursuant to the provisions of Rule 58, Paragraph 2 of the Rules of this Court.

1.

This is a case where the facts, admitted for the purposes of the exception of *res adjudicata*, shows that the

defendants entered upon a scheme for the purpose of deceiving present petitioner, did deceive it (Record, pp. 160-170, inclusive, Articles 9, 10 and 11, original petition in State Court), and, if the decision of the Louisiana Court is allowed to stand, will result in these people enriching themselves at the expens f the deceived party.

2.

In the case of Brown Land and Royalty Company, Inc., v. Frances Clark Green, *et als.*, lately pending in the United States Court of Appeals for the Fifth Circuit (the parties there being identical with those here), present petitioner brought to the attention of the said Court of Appeals, the fact that its ruling in dismissing present petitioner's suit there had the effect of depriving it of its right to cross-examine present defendants in order to ascertain whether they or any of them had accepted their mother's succession and this was brought to the attention of Your Honors at page 6 of present petitioner's petition for a writ of certiorari which bears No. 438 on the October Term, 1952, docket of this Court.

3.

That the action of the United States Court of Appeals for the Fifth Circuit in approving the District Judge's action in granting present defendants' motion to dismiss, limited present petitioner to the issues presented in the former case and was tantamount to holding that the case was left open for petitioner to bring a new suit on any other ground it might have. This Court has so held, particularly in *Stark v. Starr*, 94 U. S. 477, where Your Honors said:

"Having required the complainants to proceed in that suit only upon one ground or course for relief, the court left the other cause open for any future suit, which they might choose to bring."

4.

That present petitioner instituted another suit in the State Court alleging the acceptance of Mrs. Clark's succession by present defendants, together with allegations showing that these same defendants carried out a fictitious proceeding purporting to administer upon the estate of the same Mrs. Clark, for the purpose of deceiving present petitioner.

5.

That annexed to that petition present petitioner propounded interrogatories to present defendants, but defendants opposed answering the interrogatories and tendered an exception of *res adjudicata*, contending that the effect of the Federal Court Judgment was to bar present petitioner from prosecuting this suit, which exception was ultimately maintained by the Supreme Court of Louisiana.

6.

In view of the foregoing the present situation is this: The United States Court of Appeals refused to allow petitioner to cross-examine its opponents requiring petitioner to assert its right in a second suit. The Supreme Court of Louisiana has refused to allow present petitioner to offer any evidence in support of its claim or to cross-examine its opponents in the face of a direct allegation by petitioner that present defendants have used the process

of the Louisiana Courts for the purpose of concealing the truth from petitioner, and had actually, therefore, accepted their mother's succession. Under these circumstances, we say that this petitioner has not been afforded an opportunity to be heard despite the fact that it made its claim both to the United States Court of Appeals and the State Courts of Louisiana and that, accordingly, one of the fundamental requirements of due process of law has not been met. Therefore, we think the situation presented in this case is grave enough to require this Court to intervene in order that justice may be done and this petitioner accorded due process of law.

For the foregoing reasons petitioner submits that this petition for a rehearing should be granted and a writ of certiorari ordered to issue.

Brown Land & Royalty Company, Inc.

By its Attorneys:

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615 Herndon Avenue,
Shreveport, Louisiana;

ROBERT G. CHANDLER,
918 Commercial Building,
Shreveport, Louisiana.

CERTIFICATE.

I, Frank J. Looney, an attorney of the Bar of the Supreme Court of the United States, certify that the above and foregoing petition for a rehearing is filed in good faith and not for delay, further certifying that the petition is limited to the grounds hereinabove set forth which were available to petitioner although not previously presented to the Court.

I further certify that a copy of said petition was served upon all the defendants on February , 1955, by depositing the same in the United States Post Office at Shreveport, Louisiana, with first class postage prepaid addressed to the following counsel of record:

To Calvin E. Hardin, Jr.,
Louisiana National Bank Building,
Baton Rouge, Louisiana;

To Charles B. Dameron,
Louisiana National Bank Building,
Baton Rouge, Louisiana;

To Ferd C. Claiborne,
New Roads, Louisiana,
as attorneys for Hattie C. Pickett, Frances Clark Green, Florena Clark Thomas, Agnes Clark Worsham, Toral E. Clark and Samuel H. Clark;

To D. Douglas Howard,
Legal Department,
The Texas Company,
New Orleans, Louisiana,
as attorney for The Texas Company.

Shreveport, Louisiana, February ....., 1955.

FRANK J. LOONEY,
615 Herndon Avenue,
Shreveport, Louisiana.